

[4310-55]

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[50 CFR Part 17]

ENDANGERED AND THREATENED WILDLIFE
AND PLANTSProposed Determination of Critical Habitat for
the Maryland DarterAGENCY: Fish and Wildlife Service,
Interior.

ACTION: Critical Habitat proposal.

SUMMARY: The Service hereby proposes Critical Habitat for the Maryland darter (*Etheostoma sellare*) in northeastern Maryland. This proposal would make this area subject to full protection under section 7 of the Endangered Species Act of 1973 and is being taken to insure the integrity of the Deer Creek and Gasheys Creek aquatic ecosystem. This area is the native range of the Maryland darter and contains the only habitat for this species. The Maryland darter was listed as Endangered in 1967.

DATES: Comments from the public must be received by July 11, 1978. Comments from the Governors of States involved with this action must be received by August 10, 1978.

ADDRESSES: Submit comments to Director (OES), U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240.

Comments and materials received will be available for public inspection during normal business hours at the Service's Office of Endangered Species, Suite 1100, 1612 K Street NW., Washington, D.C.

FOR FURTHER INFORMATION
CONTACT:

Mr. Keith M. Schreiner, Associate Director—Federal Assistance, Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C. 20240, 202-343-4846.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Maryland darter is presently known only from the lower portion of Deer Creek and Gasheys Creek, tributaries of the Susquehanna River, in Harford County, Md. It has also been

reported from Swan Creek, also in Harford County. Precise locality information for the Swan Creek locality is not known; however, numerous samples from several localities have not revealed the presence of the Maryland darter. The darter was probably more widespread in the past, but how wide ranging is not known. Factors which could have resulted in the elimination of populations in the lower Susquehanna River include impoundments, pollution, and siltation.

Threats to the continued existence of the Maryland darter are related to the maintenance of its aquatic ecosystem. Siltation and pollution are factors which presently threaten the darter's habitat. Possible increased withdrawal of water from Deer Creek is an additional factor which could adversely impact the species. The proposed Critical Habitat is the only known habitat for the Maryland darter.

CRITICAL HABITAT

Section 7 of the Act, entitled "Inter-agency Cooperation," states:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction of modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

A definition of the term "Critical Habitat" was published jointly by the Fish and Wildlife Service and the National Marine Fisheries Service in the **FEDERAL REGISTER** of January 4, 1978 (43 FR 870-876) (to be codified as 50 CFR Part 402) and is reprinted below:

"Critical habitat" means any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: Physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.

As specified in the regulations for Interagency Cooperation as published in the January 4, 1978, **FEDERAL REGIS-**

TER (43 FR 870), the Director will consider the physiological, behavioral, ecological, and evolutionary requirements for survival and recovery of listed species in determining what areas or parts of habitat are critical. These requirements include, but are not limited to:

- (1) Space for individual and population growth and for normal behavior;
- (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
- (3) Cover or shelter;
- (4) Sites for breeding, reproduction, or rearing of offspring; and generally,
- (5) Habitats that are protected from disturbances or are representative of the geographical distribution of listed species.

The application of these factors, based on data presently available, to the proposed Critical Habitat of the Maryland darter are discussed in the following paragraph.

The proposed streams include sufficient area for normal population growth and individual movements. Riffle and pool areas provide habitat for aquatic insects and snails, the Maryland darter's food. Large gravel and cobbles in the streams proposed as Critical Habitat provide cover for the Maryland darter. Although reproduction has not been observed, it is presumed to occur in the proposed area since the fish is not known to occur elsewhere. The streams proposed include the only known habitat of the Maryland darter.

The areas included in this proposal do not necessarily include the entire Critical Habitat of the Maryland darter, and modifications of its Critical Habitat designations may be proposed in the future. In accordance with Section 7 of the Act, all Federal departments and agencies are required to insure that actions authorized, funded, or carried out by them would not result in the destruction or adverse modification of the Critical Habitat of the Maryland darter.

There may be many kinds of actions which can be carried out within the Critical Habitat of a species which would not be expected to adversely affect that species. This point has not been well understood by some persons. There has been widespread and erroneous belief that a Critical Habitat designation is something akin to establishment of a wilderness area or wildlife refuge, and automatically closes an area to most human uses. Actually, a Critical Habitat designation applies only to Federal agencies, and essentially is an official notification to these agencies that their responsibilities pursuant to Section 7 of the Act are applicable in a certain area.

A Critical Habitat designation must be based solely on biological factors. There may be questions of whether

and how much habitat is critical, in accordance with the above interpretation, or how to best legally delineate this habitat, but any resultant designation must correspond with the best available biological data. It would not be in accordance with the law to involve other motives, for example, to enlarge a Critical Habitat delineation so as to cover additional habitat under Section 7 provisions, or to reduce a delineation so that actions in the omitted area would not be subject to evaluation.

There may indeed be legitimate questions of whether, and to what extent, certain kinds of actions would adversely affect listed species. These questions, however, are not relevant to the biological basis of Critical Habitat delineations. Such questions should, and can more conveniently, be dealt with after Critical Habitat has been designated. In this respect, the Service and the National Marine Fisheries Service, in cooperation with other Federal agencies, have drawn up regulations which, in part, establish a consultation and assistance process for helping to evaluate the possible effects of actions on Critical Habitat. Provisions for Interagency Cooperation were published on January 4, 1978, in the FEDERAL REGISTER (43 FR 870-876) (to be codified as 50 CFR Part 402) to assist Federal agencies in complying with Section 7 of the Endangered Species Act of 1973.

PUBLIC COMMENTS SOLICITED

The Director intends that the rules finally adopted will be as accurate as possible in delineating the Critical Habitat of the Maryland darter. The Director, therefore, desires to obtain the comments and suggestions of the public, other concerned governmental agencies, the scientific community, or any other interested party on these proposed rules.

Final promulgation of Critical Habitat regulations will take into consideration the comments received by the Director. Such comments and any additional information received may lead the Director to adopt final regulations that differ from this proposal.

A draft environmental assessment has been prepared in conjunction with this proposal. It is on file in the Service's Office of Endangered Species, 1612 K Street NW., Washington, D.C., and may be examined during regular business hours. A determination will be made at the time of final rulemaking as to whether this is a major Federal action which would significantly affect the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969.

The primary author of this proposed rule is Dr. James D. Williams, Office of Endangered Species, 202-343-7814.

REGULATION PROMULGATION

Accordingly, it is hereby proposed to amend Part 17, Subchapter B of Chapter I, Title 50 of the Code of Federal Regulations, as set forth below.

§ 17.95 [Amended]

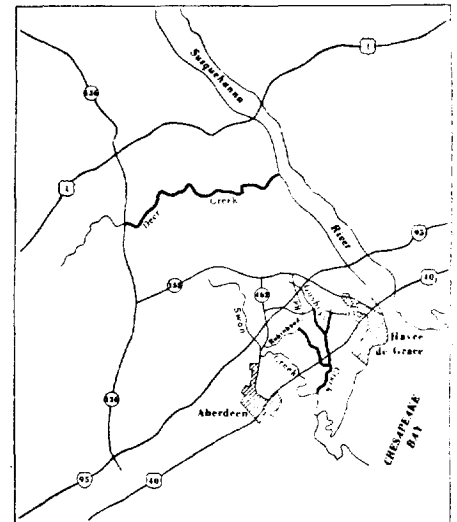
The Service proposes to amend § 17.95(e) by adding Critical Habitat of the Maryland darter after that of the slackwater darter as follows:

(e) *Fishes*. * * *

MARYLAND DARTER (*Etheostoma sellare*)

Maryland. Harford County. Deer Creek main channel from Maryland highway 136 downstream to its junction with the Susquehanna River. Gasheys Creek main channel including its eastern and western branches from Maryland highway 157 and Robinhood Road downstream to its junction with Swan Creek.

MARYLAND DARTER
Harford County, MARYLAND



NOTE.—The Service has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11949 and OMB Circular A-107.

Dated: May 1, 1978.

LYNN A. GREENWALT,
Director, Fish and
Wildlife Service.

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